

Sanctioning Authority

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Introduction

- IDEA HOs have broad authority to do all things reasonably necessary for the proper administration of the due process hearing
- HOs have inherent authority to control the hearing room to prevent disruption

Introduction

- HOs also have inherent authority to control the course of the due process hearing to ensure an effective, efficient and timely hearing
- Less apparent is the authority to discipline parties and/or their lawyers for misconduct

Objectives

- To review select state laws / regs that provide IDEA HOs with sanctioning authority
- To review select case law in which the HO sanctioned a party and/or the attorney for misconduct
- To identify various factors to weigh when considering whether to sanction
- To discuss the range of sanction options that HOs can consider

HO Authority - Generally

- IDEA delineates the specific rights accorded to any party to the due process hearing (see, e.g., § 300.512)
- HOs are charged with the specific responsibility to accord each party a meaningful opportunity to exercise these rights

HO Authority - Generally

- It is also expected that HOs ensure that the DPH serves as an effective mechanism for resolving disputes between the parties
- Perhaps also to establish a post-decision basis for the parties to work together as partners to educate the student

HO Authority - Generally

- Apart from the hearing rights set forth in IDEA, OSEP has said that decisions regarding the conduct of DPHs are left to the discretion of the HO, provided ...

HO Authority - Generally

- that any decision made is consistent with basic elements of due process; and
- the rights of the parties set out in the IDEA

HO Authority - Generally

- With few exceptions (e.g., dismissal for insufficiency or for failure to participate in the resolution meeting), IDEA does not specify what additional penalties and sanctions (if any) are within the HO's case management arsenal

HO Authority - Generally

- Does the HO's authority to do all things that are reasonably necessary for the proper administration of the DPH extend to sanctioning authority?
- Easy answer - yes, when state law expressly grants the HO said authority

HO Authority - Generally

- Majority of states, however, do not address the issue or simply flirt with the issue
- But if OSEP and the courts tell us that we have broad powers and discretion to manage the hearing process under the IDEA, isn't the authority to sanction implied?

Inherent Authority

- Implied authority = Inherent Authority
- What is implied authority?
 - Power not derived from any express authority but arising from necessity

Select Case Law Examples

- In states that do not expressly provide for sanctioning authority, HOs who have exercised sanctioning authority have done so under the assumption that ...
 - their authority is coextensive with that of the court; and
 - they have inherent authority

Select Case Law Examples

- Hillsdale Cmty. Sch. - awarding \$308.86
- Okemos Pub. Sch. - dismissing with prejudice
- Dist. City 1 & Dist. City 2 Pub. Sch. - awarding \$2000

Factors to Consider

- When determining what type of sanction would be appropriate, the HO must balance his interest in managing the hearing process with each party's interest in receiving a fair chance to be heard
- Factors - a work in progress

First Factor

- Is the misconduct willful or committed in bad faith?
- Make a distinction between willful misconduct and inadvertent mistakes
- Incompetence or inexperience leading to inadvertent mistakes may rise to willful misconduct

Second Factor

- Was the offending individual put on notice of the possibility of sanctions being imposed?
- Issue stern warnings when party or attorney is acting inappropriately

Third Factor

- Has the individual continually engaged in the same offending behavior despite repeated warnings to stop?
- Consider sanction only after offending conduct continues and after individual put on notice (Second Factor)

Fourth Factor

- Has a record been made of the intermediate steps taken, or the warnings issued, by the HO to avoid the imposition of sanctions?
- Steps taken to avoid sanctions should be reflected in/on the record, including all warnings

Fifth Factor

- Is it just?
- A permissible sanction should be no more than required to satisfy a legitimate purpose
- When lesser sanctions can address the misconduct, first test the effectiveness of the lesser sanctions

Sixth Factor

- Is there a direct relationship between the offensive conduct and the sanction?
- Make sure that the sanction is carefully devised to address the specific misconduct
- Sixth Factor goes hand-in-hand with the Fifth Factor

Seventh Factor

- Is the parent appearing pro se?
 - Unrepresented parents need more leeway
 - Absent willful misconduct or bad faith, inadvertent mistakes should not be sanctionable

Eighth Factor

- Is the sanction directed to the individual(s) responsible for the offensive conduct?
 - Direct the sanction to the attorney, the party, or both
 - If party unaware of attorney misconduct, do not punish parent, student or school district

Ninth Factor

- Will the student be penalized for the parent or attorney's conduct?
 - The sins of the father should not be visited on the child.
 - The right to FAPE rests with the child, not the parent or attorney

Tenth Factor

- Is the compliant party likely to be prejudiced should the HO not sanction the misconduct?
- What is the potential of having to defend and incur costs associated with multiple filings and dismissals?

Other Consideration

- There may be a need to hold a limited hearing to determine the facts as a basis for whether a sanction is appropriate and, if so, against whom
- May not be possible depending on the hearing timeline

Range of Options

- Range of options is largely dependent on the creativity of the HO or reliance on analogous federal and state rules
- Particulars of each situation should inform whether a sanction is appropriate and the form it should take

Range of Options

- Warnings, verbal/written reprimands, including directing counsel to instruct/control their client
- Removing a disruptive individual from the hearing
- Requiring a party and/or their counsel, or a pro se parent, to acknowledge and agree on the record to follow the HO's directive
- Assessment of actual costs

Range of Options

- Shifting the burden of production
- Shifting the order of presentation
- Exclusion of certain exhibits or testimony
- Limiting testimony
- Issuing an adverse inference
- Precluding affirmative defenses

Range of Options

- Advising the court in the decision as to whether a party or attorney's conduct should be considered when awarding attorneys' fees
- Dismissal of an issue or the case with or without prejudice, noting misconduct when the dismissal is predicated on the misconduct
- Filing a grievance with the state bar
